

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1118

To be argued by
STEVEN M. SCHATZ

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1118

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANNE LAMONT,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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ANNE LAMONT,

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Anne Lamont appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on February 4, 1977, following a three-week trial before the Honorable Edmund L. Palmieri, United States District Judge, and a jury.

On September 23, 1976, Indictment S 74 Cr. 762,* on which Lamont was tried, was filed, charging Lamont with

* Indictment 74 Cr. 762, filed and placed under seal on July 31, 1974, charged the defendant Anne Lamont with one count of travel fraud in violation of Title 18, United States Code, Section 2314. On February 4, 1975, the Indictment was unsealed and on February 18, 1975 a bench warrant was issued for Miss Lamont's arrest. Miss Lamont was not arrested until May 27, 1976. On August 20, 1976, superseding Indictment S 74 Cr. 762 was filed charging Lamont with four counts of wire fraud in violation of Title 18, United States Code, Sections 1343 and 2, and the original count of travel fraud in violation of Title 18, United States Code, Sections 2314 and 2.

six counts of wire fraud, one count of travel fraud, and one count of mail fraud in violation of Title 18, United States Code, Sections 1343, 2341, 1341 and 2. The Indictment set forth two fraudulent schemes, an advance fee scheme to defraud Studio Center, Ltd. and John Barry, and a bank loan scheme to defraud the First National Bank of South Charleston, South Charleston, West Virginia ("the West Virginia Bank"), Snellen Johnson and Navsat Systems, Inc. ("Navsat").

The Indictment alleged that to perpetrate the Studio Center-Barry fraud, Lamont, masquerading as a successful and substantial international financier, secured from a United Nations official, Dr. John Stoessinger, false, misleading and exaggerated letters of recommendation that she used to convince Barry to advance \$60,000 in exchange for her false promise to secure \$2 million in financing for Studio Center. With respect to the Navsat-West Virginia Bank fraud, the Indictment charged a similar exploitation of these false letters of recommendation in order to secure from the West Virginia Bank a loan of approximately \$200,000. In short, the Indictment alleged that Lamont obtained from Johnson 200,000 shares of Navsat stock on the false promise that she would use them to obtain moneys for Johnson and Navsat and that she later, with the aid of the false Stoessinger letters, used this stock to obtain a \$200,000 "loan" from the West Virginia Bank.

Trial against Lamont commenced on November 22, 1976, and concluded on December 10, 1976, when the jury returned a verdict of guilty on Counts One through Four, which pertained to the Studio Center-Barry fraud and Counts Six through Eight, which pertained to the Navsat-West Virginia Bank fraud.*

* The jury was unable to reach a verdict on Count Five, the travel fraud count; accordingly, a mistrial was declared with respect to that count.

On February 4, 1977, Judge Palmieri sentenced Lamont to concurrent terms of three years' imprisonment and fined her \$1,000 on each of the seven counts on which she had been found guilty. In addition, pursuant to Title 28, United States Code, Section 1918, Lamont was ordered to pay the cost of prosecution. At the time of the sentence, bail was set at \$75,000 cash or surety plus a \$25,000 personal recognizance bond, which bail was posted. Accordingly, Lamont is at liberty pending this appeal.*

Statement of Facts

Government's Case

The Government's case, consisting of twenty-three witnesses, several hundred exhibits, and a number of stipulations, overwhelmingly established that Lamont had committed the frauds charged in Counts 1-4, and 6-8 of the Indictment.

A. The Stoessinger Letters

Among the means employed by Lamont to induce her victims to advance monies and property to her were the use of false, exaggerated and misleading letters of recommendation secured from an important United Nations official, Dr. John Stoessinger. John Stoessinger, a professor at City University of New York, former Acting Director of Political Affairs at the United Nations and Director of the Institute of the United Nations at City University of New York, met Lamont in December 1971

* On September 9, 1976, John Stoessinger, who testified at the trial for the Government, pleaded guilty to misprision of felony in violation of Title 18, United States Code, Section 4. On January 18, 1977, the Honorable Charles S. Haight, Jr. sentenced Stoessinger to a term of probation for eighteen months with a special condition that he devote two hours a week to teaching at the Metropolitan Correctional Center.

and shortly thereafter their relationship evolved into a love affair. (Tr. 101, 103, 105, 112, 115, 116).^{*} Lamont carefully cultivated their relationship and told Stoessinger that she hoped to contribute approximately \$500,000 for the U.N. Institute and up to \$1 million dollars for the World University, two U.N. related projects with which Stoessinger was closely associated. (Tr. 114, 139). These promises were never fulfilled. To further seduce Stoessinger, Lamont told him that through her prior employment with RCA and her association with "Bobby Sarnoff", she could and would arrange for RCA to distribute to its employees and clients 400,000 copies of Stoessinger's book, *Nations in Darkness*. (Tr. 138-40, 149, 182). Whenever Stoessinger became disillusioned with Lamont's empty promises, she provided him with "advances" or "loans" totalling \$80,000 on commissions that she assured him would result from the phantom RCA book project. (Tr. 180-81, 221-22, 387-88; GX 15, 474-A, 29).^{**}

Stoessinger, at Lamont's direction wrote a series of false, misleading, and exaggerated letters of recommendation on United Nations and City University letterhead stationery. The letters were used for purposes different—and far more nefarious—than those for which Stoessinger had been told. The letters, which were largely dictated by Lamont, (Tr. 121)^{***} extolled Lamont's supposed international financing reputation, and included language that "certified that Miss Anne

^{*} The abbreviation "Tr." refers to the trial transcript; "GX" refers to Government Exhibits. "DX" refers to defendant Lamont's Exhibits. The abbreviations "Br." and "A" respectively refer to Lamont's Brief and Appendix.

^{**} The evidence at trial revealed that \$50,000 of these funds came from the proceeds of the West Virginia fraud; \$30,000 were derived from the Barry-Studio Center fraud. (GX 29, 474-A).

^{***} Without Stoessinger's knowledge, Lamont gave copies of the letters to prospective victims such as Barry and George Martin at crucial times during the scheme. See, e.g., GX 1-C, 1-C (1), 13-A, 13-B(1), 14-A(1), 21-A.

Lamont has been appointed a member of the Peace Research Unit of the Political Affairs Division of the United Nations . . . [and] Miss Lamont has already performed valuable services in this connection" and that "in her official capacity, Miss Lamont enjoys all the privileges and immunities regularly accorded to members of the United Nations staff." (GX 13a, 13(b), 13(b)(1)). In fact, Lamont had not performed any valuable services for the Peace Research Unit, (Tr. 170) Stoessinger had no independent knowledge of Lamont's reputation, (Tr. 122, 212), and unbeknownst to her prospective victims the phrase "privileges and immunities" accorded to the U.N. staff was a "meaningless statement because no member of the U.N. staff at that level has an[y] privileges and immunities." (Tr. 169, 170, 204-05).

B. The Navsat-West Virginia Fraud (Counts 6-8)

The first fraud charged in the Indictment was a bank loan scheme perpetrated on the West Virginia Bank. Lamont obtained, by the use of false promises, restricted shares of Navsat stock, and then used those shares to obtain a \$200,000 "loan". In addition to supplying the bank with defective collateral, Lamont submitted a financial affidavit that overstated her income by \$700,000 as well as a number of the letters of recommendation secured from Dr. Stoessinger.

In the fall of 1970, Snellen Johnson, the Chairman of Navsat contacted Lamont, with whom he had worked on a prior project, and asked her to assist in obtaining financing for Navsat, an undertaking Lamont readily accepted. (Tr. 1120, 1353-54, 1357).^{*} In early March 1971, Lamont contacted Johnson and told him that she could obtain financing if he would bring to Switzerland

^{*} At the time Navsat Systems was named Satellite Navigation Corporation. (Tr. 1359-60).

shares of both Navsat and American Ranch and Recreation, another company in which Johnson was a principal. (Tr. 1367). Accordingly Johnson provided Lamont with 200,000 shares of Navsat stock, certificate numbers 894 and 895, and 360,000 shares of American Ranch stock, certificate numbers 2076 through 2080. Lamont was well aware that all of the stock given to her was restricted. (Tr. 1362-63, 1364, 1367, 1373-74, 1379, 1394), although only American Ranch certificates 2078 through 2080 bore restricted legends. (Tr. 1367, 1372-74; GX 458A and B, 447).

Subsequent to Johnson's trip to Switzerland, Lamont advised Johnson that she had been unsuccessful in her attempt to obtain financing in Europe, but reiterated her assurances that she would continue to use the stock to secure financing for Johnson and Navsat. (Tr. 1375-76). This understanding was later incorporated in a letter agreement dated January 10, 1972. (Tr. 1375-77; GX 415).^{*} When Johnson later requested the return of the stock, Lamont attempted to placate him by reassuring him that she was still working on the financing. (Tr. 1391).

Lamont did, indeed, make use of the stock—but for her own purposes, not for the benefit of Navsat or Johnson. In late May 1972, Lamont went to the West Virginia Bank and met with George Martin, the West Virginia banker. On May 30, 1972, Lamont specified that: "the purpose of the loan was operating capital to pay her expenses abroad and into the various places she was working on intercontinental loans to pay her expenses until some of them were closed." (Tr. 1794). She further told Martin that "she had some connection with the United Nations" and provided to the Bank, *inter alia*, two of the letters of recommendation that she

^{*} The parties stipulated that Lamont signed GX 415, the "Understanding" between Johnson and Lamont. (Tr. 2030).

had procured from Dr. Stoessinger. (Tr. 1794, 1797-1801, 2104-05; GX 13B-1, 14A-1).^{*} In addition, Lamont submitted a phony financial statement, signed in Martin's presence, which stated that her income was \$723,000 and that her net worth was in excess of \$2 million dollars. (Tr. 1806-07; GX 430).^{**} Lamont compounded her fraud by pledging as collateral the restricted shares of Navsat stock—stock which conveniently did not bear the restricted legend and which she had agreed would be used to help finance Navsat. (Tr. 1810).^{***}

Prior to accepting the stock as collateral, Martin received assurances from Lamont that the stock was free-trading. (Tr. 1810). Martin then advised Lamont that no funds could be advanced until the stock had been physically pledged. Because Lamont's stock was located in New York, Lamont told Martin that she would deliver it to Manufacturers Hanover, the West Virginia Bank's New York correspondent. (Tr. 1812-13). Martin then called Manufacturers Hanover in New York and authorized the issuance of \$154,000 in checks to Lamont upon receipt of 200,000 shares of Navsat stock, certificate numbers 894 and 895. (Tr. 1814, 2032).^{****} On May 31, 1972, Lamont deposited the Navsat

^{*} Both these letters falsely and misleadingly portrayed Lamont as a member of the Peace Research Unit and used the deceptive "privileges and immunities" language.

^{**} Martin testified that "A financial statement is required in every loan that is made by the bank to any borrowing customer." (Tr. 1807). This financial affidavit was uncontrovertibly false and by her own admissions at a bail hearing on June 2, 1976, overstated her true income by over \$700,000. (GX 481, 481A, 482 through 487).

^{***} In granting the loan, Martin relied on the letters of recommendation, the financial affidavit, her collateral as well as Lamont's "appearance" and her "knowledge of the finance world." (Tr. 1878-80).

^{****} This telephone call was Count Six of the Indictment. A confirming telex of May 31, 1972 constituted Count Seven. (Tr. 1814-15, 2032; GX 439).

certificates in New York and received \$154,000 in checks. (Tr. 1813, 1815-16, 2032-33; GX 440).*

Even though the loan transactions had already been consummated, she told Johnson that to complete the loan for Navsat, further trading Navsat stock was needed as collateral. (Tr. 1344, 1396). Johnson turned to Jerry Timothy, a past president of Navsat's predecessor corporation, who owned a large block of restricted shares of Navsat but who, because of a substantial decline in his personal financial condition, was in a position to have the restrictions removed. (Tr. 1349, 1397, 1404-05, 1589, 1591; GX 418A, 418B). On June 24, 1972, after the restrictions had been removed legitimately, Timothy "sold" 200,000 shares of Navsat stock, certificate numbers 1752 and 1753 to Lamont at a price of \$2 dollars per share. Lamont promised to pay as a downpayment \$50,000, which sum was to come out of the proceeds of the loan that Lamont said was soon-to-be closed. (Tr. 1405, 1421, 1597-1601). In fact, Lamont never told Johnson or Timothy that the loan had been consummated and neither Navsat, Johnson or Timothy received any moneys from the transaction. (Tr. 1429-30, 1444, 1607). Indeed, Lamont went so far as telling Johnson that she had destroyed all the stock certificates—which was patently false. (Tr. 1430-32).** Rather Lamont used them as collateral in procuring an additional "loan" of \$25,000 and an extension of the original "loan".

* Manufacturers Hanover's letter acknowledgment of June 2, 1972, was Count Eight. (GX 440, 440A).

Within a few weeks, Lamont issued checks totalling in excess of \$175,000 including over \$50,000 to cash, \$50,000 to Dr. Stoessinger, \$34,000 to pay a civil judgment, \$25,000 to an Irwin Bornstein, \$6,000 to her sister, and \$465 to Tiffany's. (Tr. 1828, 1846, 2014-2044, 2051-53, 2091-2095; GX 219, 444A, 474B-1, and 474B-2, 474B-3, 490, 491, 492, 493).

** Accordingly, Timothy signed affidavits certifying that certificate numbers 1752 and 1753, which he had "sold" to Lamont "were either lost or stolen". (GX 418(d)(2), 418(e)(2)).

When the original loan became due in October 1972, Martin contacted Lamont, who told him that she could not pay the note. (Tr. 1832). Lamont traveled to West Virginia, met with Martin and then with Carl Lehman, a broker from Wheat Securities, to determine if any of the collateral could be sold. (Tr. 1832-33). In the meantime, the bank renewed the original loan and loaned her \$25,000 more in return for additional collateral including the shares which had been defalcated from Timothy. (Tr. 1830; GX 418(f) and 418(G)).

Later that month, Lehman informed Martin that the stock that Lamont had pledged could not be sold. (Tr. 1850, 2015). Martin then contacted Lamont on a number of occasions seeking repayment of the "loan". (Tr. 1850-52). Lamont proceeded to reassure, and lull him into a false sense of security, by still further empty promises of deals that were "going to materialize in the immediate future so that she could pay [the] bank, but they never materialized." (Tr. 1852). There then followed a stream of excuses and promises. In truth, Lamont never repaid the loan—she was substantially richer, and the West Virginia Bank was substantially poorer. (Tr. 1871, 1880).^{*} Finally, in March 1973, as a last resort, Martin complained to the SEC. (Tr. 1862; GX 463).

C. The Studio Center-Barry Fraud (Counts 1-4)

The second fraud charged in the indictment was an "advance fee" scheme perpetrated at the expense of Studio Center and John Barry, one of its principals.

In the latter part of 1972, Barry embarked on a program to obtain financing for Studio Center, for the

^{*} On October 22, 1976, the West Virginia Bank was awarded summary judgment against Lamont in the amount of \$225,000 plus interest. (Tr. 1871, 1880-1; GX 472). This judgment, needless to say, remains unsatisfied. (Tr. 1881).

three-fold purpose of (1) buying out the Cambrian Group, who owned 51% of the Studio, (2) expanding Studio Center's facilities and (3) placing the debt-ridden Studio on a firmer financial footing. (Tr. 610-12). After unsuccessful attempts to obtain financing from traditional money sources, Barry was introduced to Warren Rubel who had recently formed a British film company, called Raintree Productions. (Tr. 504, 610-11). By December 21, 1972, Rubel on behalf of Raintree, signed a "letter of intent" to provide approximately \$600,000 in financing. (Tr. 506-08, 611-12; GX 48).

During Christmas of 1972, Rubel and Lamont met in New York and discussed the Studio Center project. (Tr. 509). Lamont was "excited" about the project and told Rubel that "there was no real problems [and] that she could provide the financing for it very easily".* (Tr. 510-11, 545). Relying upon Lamont's representations that only "details" remained for the financing, on January 11, 1973, Rubel made "a binding commitment" to Studio Center that Raintree Productions would provide needed money, which "funds will be forthcoming no later than March 9, 1973." (Tr. 512-15, 613-14; GX 49).

On February 19, 1973, Barry flew to London and met with Lamont and Rubel at the Grosvenor Hotel. (Tr. 524-27, 618-22). Barry told Lamont of Studio's problems, but nonetheless Lamont enthused that the project had great potential, and that "she had arranged for the financing", which was now approximately two million dollars, and "that all she had to do was work out a few details." (Tr. 526, 619). Lamont told Barry that she had arranged loans for foreign countries, that she had contacts with European banks, and that

*It bears emphasis that this was at a time when the \$225,000 West Virginia bank "loan" already was overdue.

she had millions of dollars in commissions due her from prior deals. (Tr. 526-27, 621).*

In late February or early March, Lamont visited Toronto, toured Studio Center, and met with Keith Munro, who was then the Manager of the Bank of Montreal branch where Studio Center and Barry did their banking. (Tr. 636-38, 837, 839). Once again Lamont oozed enthusiasm for the project. In particular, she stated that she would provide the financing for the Studio, she was greatly "impressed by the physical setup and the obvious worth of the property", she represented various overseas investors with substantial funds at their disposal, and "there would be no problem in arranging approximately one and a half to two million dollars." (Tr. 638, 840). She also paraded, for Munro's and Barry's eyes, her association with the United Nations, with the World University, and with Stoessinger. (Tr. 638, 841).

On March 9th or 10th, Lamont called Barry and requested that he come to New York to discuss the financing. (Tr. 639). They met in the Park Sheraton Hotel and Lamont began telling Barry about Stoessinger—that he was political director at the United Nations, that she wanted him on Studio Center's Board of Directors, that he was an author of numerous books, and that the Studio could make films of his books. (Tr. 640). Lamont then provided Barry with two of the tell-tale Stoessinger letters. (Tr. 640-45; GX 1-C1, 14). Barry was "very impressed". (Tr. 648, 654). That evening Barry joined Stoessinger and Lamont for dinner, where they talked about Studio Center and the possibilities of Stoessinger doing educational television at the Studio. (Tr. 218-19, 655-56).

* In contrast to the optimistic image Lamont portrayed to Barry was the fact, as Lamont's own witness Michel Aubert testified, that as of February, Lamont knew that the financing of Studio Center faced "serious problems." (Tr. 2283).

Not so coincidentally, the next day Lamont met with Barry and told him that "*the financing was all arranged, to be completed in the next few days*". (Tr. 657) (Emphasis supplied). Then Lamont popped the question: she needed \$50,000 to block the funds in Europe and \$10,000 as a "loan . . . for the next three or four days, because all her money [was] tied up in Europe." (Tr. 657-58). Barry told Lamont that he did not have that kind of money and Lamont exhorted him to call his bank in Toronto. The vulnerable Barry called Munro who consented to a \$60,000 loan. (Tr. 658, 842, 845-46).* Barry immediately flew to Toronto where on March 13, 1973, he obtained a \$60,000 draft drawn on the Bank of Montreal, and made payable to himself. (Tr. 659, 846-47; GX 73). Barry then returned to New York, met Lamont at the Park Sheraton Hotel and proceeded to the Chelsea National Bank, where they met with Thomas McGee, the Manager of the Branch. (Tr. 660, 1111). Lamont told McGee that she needed the funds that day because she wanted to wire funds to Switzerland. (Tr. 1111, 1114). Upon Lamont's prodding, Barry then proceeded to call Keith Munro in Toronto to see how the matter could be expedited. (Tr. 660-61, 857).**

Barry proceeded to the Agency, Bank of Montreal to convert, as Lamont had directed, the \$60,000 Canadian bank draft to a \$60,000 check drawn in U.S. currency, and made payable, as Lamont suggested, to the Operations Multi-National—a company owned by Lamont. (Tr. 661-62, 665, 945-47; -GX 74).*** Barry then returned

* Barry's March 12, 1973 phone call to Munro formed the basis for Count One of the Indictment. (Tr. 658, 845).

** This phone call formed the basis for Count Two of the Indictment.

*** Before issuing the check in United States currency, Barry and Stanley Gordon of the Agency, Bank of Montreal called Munro to obtain approval of the transaction. (Tr. 661, 857-58,

[Footnote continued on following page]

to the Chelsea National Bank and gave Lamont the check. After waiting about twenty minutes, Lamont told Barry that the "financing was arranged, we are going to sign the papers in Europe." (Tr. 662). However, unbeknownst to Barry, the financing had not been arranged and Lamont had not wired the funds to Europe. (Tr. 975, 1112).*

Barry then embarked on the first of a number of futile trans-Atlantic attempts to secure the two million dollars for Studio Center only to encounter Lamont's familiar lament and stream of excuses on each occasion. (Tr. 672-73, 676-77, 684-85). Finally, one night in London, Lamont admitted that she had not used the \$50,000 to block the loan, but falsely told Barry that he need not worry, that she had "already covered it . . . everything was taken care of . . ." (Tr. 685-86).

In late March, Lamont, depicting herself as someone of great wealth, met with Brian Constant, an English investment banker, ostensibly for the purpose of financing mandates with a number of developing nations. (Tr. 1912-13, 1916, 1921, 1923; GX 235). Lamont procured

948-49). This phone call of March 13, 1973 formed the basis for Count Three. A confirming telex from the Bank in Toronto, to the Agency, Bank of Montreal in New York formed the basis for Count Four. (Tr. 858, 948; GX 180).

* Instead, Lamont appropriated the funds for her own benefit. (GX 217). Indeed, at the Chelsea Bank itself, Lamont gave Stoessinger a \$30,000 check, supposedly as an "advance" on the RCA book deal. (Tr. 221-23, 959, 1112; GX 29). In fact, within days Lamont withdrew over \$55,000 out of the \$60,000 provided by Barry. (Tr. 960; GX 217). In addition to the \$30,000 given to Stoessinger, Lamont gave her beautician \$5,500 to repay a loan. (Tr. 958, 998-1000; GX 195, 220A, B). Over \$6,000 went to pay the overdue phone bill of Operations Multinational (Tr. 958, 962, 984-86; GX 196, 332); \$5,500 was wired to a bank in Colorado and deposited partly in a personal account and partly her company's account, (Tr. 957, 990-95; GX 194A-C, 225-233), and \$5,000 went to "cash". (Tr. 962, 964-65; GX 199, 203).

the use of telex facilities in the same office building where Constant worked. (Tr. 1916-19; GX 236A, B). By the middle of April, Constant had become a clearing-house for a barrage of telexes and phone conversations pertaining to the alleged financing of the Studio Center project, and another of Lamont's alleged fundings, Piazza Properties. (Tr. 1924-30; GX 237-244).

In early May, she advised Constant that she had covered the \$50,000 that was purportedly needed to complete the financing, and urged Constant to send out telexes confirming the availability of the funds to finance Studio Center and Piazza Properties. (Tr. 1931; GX 252). Constant refused to send such a telex, since the funds were not available. (Tr. 1931-32). The next day, Lamont, as she had with Barry, called Constant and asked him to provide the \$50,000. (Tr. 1932). She pledged she would "pay [Constant] back in a matter of a few days". (Tr. 1932). But, unlike Barry, Constant declined Lamont's kind request. (Tr. 1932).*

In late May or early June 1973, Barry personally assumed the \$60,000 obligation from Studio Center. (Tr. 704-5; GX 145-7). By the late summer, Barry had lost contact with Lamont and his efforts to reach her were unsuccessful. (Tr. 707, 746-47).

* Lamont continued her efforts to lull Barry into a false sense of security through May 1973. She met with Barry and his lawyer Maxwell Lewis, and assured Lewis that the financing was available, showed him copies of the "Stoessinger letters" as well as a sample of correspondence and communications pertaining to the supposed financing—a sample carefully selected to convey the impression that all was well. (Tr. 687, 692-93, 920, 922-24, 927-28; GX 1-C4, 14, 137A-C). Lamont attempted to foist on Barry an Agreement of Sale and a Power of Attorney, which would have had the effect of giving her control of Barry's interest in the Studio—without having produced any of the promised financing. (Tr. 924-26; GX 136A, B). However, Lewis did not permit Barry to sign these documents. (Tr. 926).

In the fall of 1973, Barry confronted Stoessinger with the fact that Stoessinger had some of Barry's money. (Tr. 254-56, 709, 721-25). Accordingly, Stoessinger agreed to pay Barry \$3,000. (Tr. 262-64, 709). This \$3,000 would be the only portion of the \$60,000 that Barry was ever to receive; nor would Studio Center ever receive any of the promised financing. (Tr. 721). Ultimately, Barry lodged a complaint with the Postal Inspection Service. (Tr. 251, 2101, 2114).*

The Defense Case

Lamont's case consisted of two witnesses. Peter Keck testified that in 1973, Lamont attempted to obtain "Euro-dollars" to finance the purchase of Piazza Properties. (Tr. 2152-55). The Piazza project was ultimately funded by Columbia University.** (Tr. 2176). Keck also testified that Anne Lamont worked "diligently", was a "workaholic", and had made a "serious" contribution in terms of money in her efforts to finance the Piazza project. (Tr. 2162, 2181, 2210-11).

Michel Aubert, a "financier" who had reached his thirtieth birthday by the time of trial, testified that back in 1973, Lamont provided him with documents pertaining to both the Piazza Properties and Studio Center projects. Aubert testified that he concluded that Piazza was a solid venture but that Studio Center was "not a good deal."

* After the Postal Inspectors had interviewed Stoessinger in December 1973, Stoessinger pleaded with Lamont to return to the United States to resolve the Barry matter. (Tr. 258-60). In trans-Atlantic telephone calls, Lamont told Stoessinger as well as Postal Inspector Slavinski that she was wiring \$64,500, representing \$60,000 plus interest. (Tr. 260, 2102). Indeed, she sent a telex to Slavinski which so stated. (GX 265). In fact, Lamont never repaid any of the \$60,000. (Tr. 261).

** Keck testified that Columbia signed a commitment to finance the project in April, which commitment Keck soon thereafter communicated to Lamont. (Tr. 2176, 2193).

(Tr. 2220-26, 2236). This testimony backfired on the defense, since the Government elicited on cross-examination that Aubert had communicated his negative prognosis for Studio Center to Lamont before the time Lamont told Barry she believed it was promising and could arrange the financing. (Tr. 2283). Aubert also testified to various communications with third-party financiers, pertaining to possible funding proposals for the Piazza and Studio Center projects. (Tr. 2237-72).

ARGUMENT

POINT I

The District Court Properly Excluded Cumulative Testimony of Lamont's Reputation for Credibility.

Lamont claims that the district court improperly excluded testimony of a defense witness concerning Lamont's reputation for credibility after counsel had refused to inform the court whether or not Lamont would testify. Particularly under the factual circumstances of this case, this contention is wholly without merit.

During direct examination of defendant's witness Peter Keck, the court instructed the witness to "hold" his answer to a question of "Lamont's reputation for truthfulness, honesty and veracity." (Tr. 2182). At the ensuing side bar, the Court cautioned counsel about "put[ting] a question like that to a witness regarding [defendant's] *credibility* when it is not in issue." (Tr. 2183) (emphasis supplied). Counsel responded that defendant's reputation for truthfulness was in issue because it was a "fraud case" regardless whether defendant took the stand. The court rejected Lamont's theory, where the question posed pertained to defendant's reputation "[f]or truthfulness and veracity." (Tr. 2184). The court clearly enunciated on two occasions that it was rul-

ing on the admissibility of reputation testimony "for truthfulness and veracity" because such questions were probative only of defendant's "credibility." (Tr. 2181, 2183). Counsel never suggested that he would be willing to rephrase the reputation question so that it would be focused on defendant's reputation for business integrity or honesty in business practice.* See *United States v. Badalamente*, 507 F.2d 12 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975). Since the reputation question was probative only of defendant's credibility if she became a witness, the court properly directed the witness to withhold any answer. See *United States v. Walker*, 313 F.2d 236 (6th Cir.), *cert. denied*, 374 U.S. 307 (1963) (after defendant testified, prosecution allowed to prove defendant's bad reputation for truth and veracity). *Hodge v. United States*, 414 F.2d 1040 (9th Cir. 1968).

The Federal Rules of Evidence and case authority support the District Court's ruling. Under Rule 404, character evidence is not admissible except for "[e]vidence of a *pertinent* trait of his character offered by an accused, or by the prosecution to rebut the same." (Rule 404(a)(1)) (emphasis added). The rationale underlying the rule was expressed by the Supreme Court in *Michaelson v. United States*, 335 U.S. 469, 475-76 (1948):

"[C]haracter is relevant in resolving probabilities of guilt. He may introduce affirmative testimony

* The district court's interpretation of the question posed, "reputation for truthfulness, honesty, veracity", was plainly correct. The question as phrased was intended to elicit an answer that bore on Lamont's credibility, not business integrity. Indeed, under the Federal Rules of Evidence "truthfulness" in this context specifically pertains to credibility (Rule 608) as does "veracity" by definition. Although the question phrased in the trial court included the word "honesty", under the principle *nocitur a sociis*, the question as posed did not pertain to defendant's business integrity which could have been probative to the issues in the case. See Weinstein and Berger, Weinstein's Evidence ¶ 608[03], 608-18 n.5 (1976).

that the *general* estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged."

(Emphasis added).

The rationale for permitting the accused to elicit reputation testimony, therefore, is to create a basis in the record that would permit the jury to infer it was unlikely that the defendant committed the crime and so give rise to a finding of reasonable doubt. *United States v. Minieri*, 303 F.2d 550 (2d Cir.), *cert. denied*, 371 U.S. 847 (1962); *United States v. Lewin*, 467 F.2d 1132 (7th Cir. 1972). The question posed in this case, however, was not calculated to lay a foundation to permit such an inference. To the contrary, the proffered testimony merely would have bolstered Lamont's credibility for *truthfulness* and *veracity* had she testified as a witness. It would have been necessary to pose a different question in order to elicit testimony as to a trait "pertinent" to her honesty in business. This distinction is recognized in *United States v. Walker*, *supra*, 313 F.2d at 238:*

"a distinction must be drawn between (1) a defendant's general character, such as his reputation in the community wherein he lives for honesty, probity and being a law-abiding citizen, and (2) his reputation in the community wherein he lives for truth and veracity."

See *Edwards v. United States*, 374 F.2d 24 (10th Cir. 1966), *cert. denied*, 389 U.S. 850 (1967); *Hawley v. United States*, 133 F.2d 966 (10th Cir. 1943).

* *United States v. Walker* involved the converse situation where defendant testified. The Court held the trial court properly permitted the Government to call rebuttal witnesses who testified as to defendant's reputation for truthfulness and veracity but not to defendant's reputation for being law abiding.

Even if the trial court were incorrect when it construed the question as pertinent solely to Lamont's credibility, it is settled law that the district court has wide discretion in limiting the scope of proof on the issue of good character. Weinstein and Berger, Weinstein's Evidence, *supra*, ¶ 404[05]. Indeed, it is only on a clear showing of prejudicial abuse of discretion that the district court's rulings will be disturbed on appeal. *Michaelson v. United States*, *supra* 335 U.S. at 480. Here, Lamont managed to elicit evidence of her good character* from no less than six witnesses, including four Government witnesses on cross-examination.** As the Ninth

* Character evidence was elicited in the form of both opinion and reputation testimony, as permitted by Rule 405, F.R. Evid.

** Prior to the trial court's exclusion of reputation testimony from Mr. Keck, counsel already had elicited testimony from five witnesses that in their opinion Lamont had a good character for traits pertinent to the charges in the indictment. Stoessinger had testified to Lamont's "forthrightness" and "idealism", and to the effect he found her to be "energetic", "vivacious" and "positive." (Tr. 309). Martin found her "knowledgable" in the field of the international money market. (Tr. 1887). Scoretz testified to his impression that she worked hard and long hours and to his previous statement to Barry that if she failed it would not be for the lack of trying. (Tr. 1085-86). Rubel testified to his opinion of Lamont's record as a broker at Hayden Stone, including his view that she was exceptionally capable, had a good record, and was "very" hard working; he further stated she had a good reputation at Hayden, Stone. (Tr. 563-65). Indeed, Keck himself had already testified as to his opinion that she worked "diligently" to the point of being a "workaholic". (Tr. 2162, 2181-82). After Keck testified, counsel elicited character evidence in the form of reputation testimony through the second defense witness, Aubert.

The Court permitted Aubert to testify, over Government objection, that Lamont had good references from two European banks and worked very hard. (Tr. 2279, 2280, 2286-88). The court allowed Aubert's testimony notwithstanding his prior ruling as to Keck, because Aubert's character testimony related to her reputation in business dealings. Significantly, the Court severely restricted Government cross-examination of Aubert by refusing to permit questions about his knowledge of a prior SEC suspension of Lamont. (Tr. 2298-2300).

Circuit once wrote: "This would seem latitude enough." *Powell v. United States*, 35 F.2d 941, 942 (9th Cir. 1924). See *United States v. Zane*, 495 F.2d 683 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974) (no error in limiting number of character witnesses to five); *United States v. Kahan*, 479 F.2d 290 (2d Cir. 1973), *rev'd* on other grounds, 415 U.S. 239 (1974); *United States v. Jacobs*, 451 F.2d 530 (5th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972) (no abuse in limiting character witnesses to three); *Petersen v. United States*, 268 F.2d 87 (10th Cir. 1959) ("harsh", but not reversible, to limit character witness to one).

The defense's summation further established that Lamont was not prejudiced in the least by the court's ruling as to Keck's testimony. Counsel effectively peppered his summation with references to Lamont's "impeccable reputation" and the "skill that she displayed" in financial dealings, to bolster defendant's argument of good faith efforts. (Tr. 2425, 2410). Indeed, the District Court in marshalling the evidence noted Lamont's position that the Stoessinger letters were accurate statements of Lamont's abilities. (Tr. 2517-18). Under these circumstances, there was no prejudicial abuse of discretion in prohibiting Keck to answer questions pertaining to Lamont's reputation for credibility.*

Finally even if this Court finds that exclusion of the reputation testimony was error and was not waived

* This issue, in any event, was waived by trial counsel. Despite the Court's repeated requests to cite some authority for the proposition that the reputation testimony was admissible (Tr. 2184, 2186, 2187) counsel not only did not come forward with a citation, but appeared to concede there might be none when he indicated he would withdraw the question since the Court ruled that it would require citation to some authority before the question could be answered. (Tr. 2186). Having withdrawn the question and having further failed to make an offer of proof, the issue was waived. See *Hwley v. United States*, *supra*, 133 F.2d at 973.

—findings which the Government vigorously opposes—the error was harmless beyond any reasonable doubt. *United States v. Pineros*, 532 F.2d 868 (2d Cir. 1976); see also *United States v. Kelner*, 534 F.2d 1020, 1028 (2d Cir.), *cert. denied*, — U.S. — (1976), 45 U.S.L.W. 3431 (Dec. 14, 1976). In light of the overwhelming evidence of Lamont's guilt, there is not even the remotest possibility that by admitting proof through Keck, of Lamont's reputation for truthfulness and veracity the result could have been different.*

POINT II

The Trial Judge Was Fair And Impartial, And Did Not Unfairly Interject Himself Into The Trial.

Lamont contends that "the Court repeatedly urged the jury to sympathize with Government witness John Stoessinger" and contends that "the Court marshalled the evidence unfairly." (Br. 16, 37). These contentions are utterly devoid of merit.

* Lamont suggests that the trial court improperly commented on defendant's failure to testify. The Court, of course, never commented on Lamont's decision not to testify. Instead, it merely inquired whether she would testify in order to determine the relevance of the reputation question. The Court promptly instructed the jury that the purpose for the Court's question had been to determine the relevance of counsel's question, further cautioning that the burden of proof remains on the Government and that the defendant has the right to remain silent. (Tr. 2189-90). The Court later instructed the jury to draw no inference from defendant's failure to testify nor from the Court's questions. (Tr. 2575, 2493). Under these circumstances the Court's question to counsel does not warrant reversal since "the language used was not 'manifestly intended or . . . of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *United States v. Araujo*, 539 F.2d 287, 291 (2d Cir. 1976) (citations omitted).

Initially, Lamont finds fault with a series of questions posed by the Court that elicited from Stoessinger information concerning his educational background and his feelings toward the defendant at the time of trial. These lines of inquiry are so clearly permissible and relevant that it is difficult to fathom the precise basis for the objection, and indeed it is symptomatic that Lamont does not cite a single decision of this or any other Court in this entire point. Specifically, after counsel for both sides had completed their inquiries, Judge Palmieri asked Stoessinger:

"You mentioned giving your Phi Beta Kappa key to the defendant at one point. Some of the jurors are not college graduates and perhaps have never gone to college. Would you explain what a Phi Beta Kappa key is?" (Tr. 487).

Stoessinger's response that the key was awarded for "academic excellence", was hardly devastating testimony. (*Id.*). Judge Palmieri then inquired into Stoessinger's "present feelings toward the defendant." (*Id.*)* Contrary to the implication of Lamont's brief, Stoessinger's response was not all one-sided. Stoessinger responded:

"I am frankly puzzled and my feelings are extremely mixed. On the one hand, my heart tells me, your Honor that she loved me and that she loaned me those funds because she really wanted to make good on that book project. My mind tells me, however, that perhaps she tried to leverage my connection at the United Nations in order

* In a colloquy at the side bar with counsel, Judge Palmieri elaborated:

"My only purpose in asking the questions was to determine for the jury's benefit what his present motivations may be with respect to this woman and you opened the door with respect to his plea, whether he wanted to get out from under a sentence, which you should have done, but this was just to complete that chapter." (Tr. 493-94)

to make profits for herself." (Tr. 490). (Emphasis supplied.)

To further clarify the issue for the jury, the judge then asked whether he was testifying out of a sense of "animosity" or "resentment"; Stoessinger's response was not without ambiguity: "Not at all. I don't hate her. I am just confused. I don't understand it." (Tr. 490-91). Finally, Judge Palmieri proceeded to ask Stoessinger to enumerate the schools he attended and the time period of his employment with the United Nations.* This inquiry was entirely proper. *United States v. Cuevas*, 510 F.2d 848, 850 (2d Cir. 1975); *United States v. Curcio*, 279 F.2d 681, 682 (2d Cir.), cert. denied, 364 U.S. 824 (1960); *United States v. Pellegrino*, 470 F.2d 1205, 1206-7 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973). Judge Palmieri "was doing no more than asking such questions as would serve the ends of justice by assisting the jury in understanding the evidence." *United States v. Natale*, 526 F.2d 1160, 1170 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976). See also *United States v. Reed*, 526 F.2d 740, 743 (2d Cir. 1975), cert. denied, 424 U.S. 956 (1976).

The Court's inquiry was neutral on its face and did not reveal a view on the merits nor did it "usurp the function either of the jury or of the representatives of the parties." *United States v. De Sisto*, 289 F.2d 833, 834 (2d Cir. 1961) or indicate in any way that the judge had "enter[ed] the lists." *United States v. Marzano*, 149 F.2d 923, 926 (2d Cir. 1945) (L. Hand, J.). Nor did Judge Palmieri interrupt counsel in its inquiry. See, e.g., *United States v. Brandt*, 196 F.2d 653 (2d Cir.

* Significantly, Judge Palmieri asked other witnesses, including Snellen Johnson and George Martin, about their educational and business background. (Tr. 1576 and 1902). L. mont makes no suggestion on appeal that these inquiries were improper.

1952). Indeed review of the record reveals that the Court manifested great restraint and impartiality throughout the trial,* in direct contradiction to those few cases where this Court has reversed a conviction because of improper intervention by the trial judge. See, e.g., *United States v. Fernandez*, 480 F.2d 726, 737 (2d Cir. 1973).

Lamont's suggestion that Judge Palmieri impermissibly bolstered Stoessinger's testimony in his charge to the jury is equally without merit. The challenged passage falls well within the ambit of permissible comment on the evidence.

The right of a District Court Judge to summarize and to comment on the evidence in his instructions to the jury is settled in this Circuit. *United States v. Lombardi*, Dkt. No. 76-1471, Slip Op. 2103, 2105-6 (2d Cir. March 1, 1977); *United States v. Cheung Kin Ping*, Dkt. No. 76-1362, Slip Op. 2063, 2067-68 (2d Cir. Feb. 28, 1977); *United States v. De La Motte*, 434 F.2d 289, 291-2 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *United States v. Tourine*, 428 F.2d 865, 869, 870 (2d Cir. 1970), *cert. denied as Burtman v. United States*, 400 U.S. 1020 (1971); *United States v. Dardi*, 330 F.2d 316, 330 (2d Cir.), *cert. denied*, 379 U.S. 845 (1964). A trial judge may even "express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are

* It bears special emphasis that Judge Palmieri's questions often highlighted possible soft spots in the Government's case. For example, Judge Palmieri's inquiry of Snellen Johnson elicited that Johnson described his failure to place the restricted legend on the stock as an "oversight" (Tr. 1579-80), that it was an oversight of some importance (Tr. 1581), and that the "oversight" facilitated the transaction. (Tr. 1581-83).

Judge Palmieri's charge, while scrupulously leaving the ultimate determination to the jury, also pointed out certain weaknesses in Johnson's testimony. (Tr. 2567-68).

submitted to their determination." *Quercia v. United States*, 289 U.S. 466, 469 (1932).

Here the challenged passage represented an even-handed descriptive summary of Stoessinger. Thus, while the Court did refer to him as an "important figure in the U.N.," and a man of some distinction, he also pointed out that Stoessinger wanted "Mr. [Kurt] Waldheim to sign [a letter of recommendation for Lamont] and couldn't get it from him," and that Stoessinger "received substantial sums of money" from the defendant, all of which tended to diminish Stoessinger's credibility. (Tr. 2560-61).

Indicative of the baselessness of Lamont's claim is the fact that, in his summation, defense counsel attempted to attack Stoessinger's credibility in terms that are remarkably similar to those now assigned as so prejudicial in this Court.* Thus, fairly viewed in context, Judge Palmieri merely referenced, as did defense counsel, Stoessinger's academic credentials, including his Phi Beta Kappa key, and the fact that he received a substantial sum of money, supposedly in connection with the RCA book project. (Tr. 2422, 2560-61).**

* Defense counsel argued:

"Stoessinger comes here with impeccable credentials, Phi Beta Kappa key, which he gave, that sweet fraternity pin, and he also gave other things to Anne Lamont. He gave Anne Lamont the right to give him \$80,000. It was just lovely. \$80,000 has disappeared in that man's hands. \$80,000. But that egotist has been so directed to his own interests that why, why is it that he is perturbed at this defalcation, this ache of the heart that has beset him? Why is it he is disturbed? He is disturbed because somebody promised he was going to sell 400,000 copies of the book and he didn't get it. So he took \$80,000 and that is okay." (Tr. 2422).

** In addition, defense counsel's reference to Stoessinger's "ache of the heart" presaged Judge Palmieri's comment that Stoessinger "wept" in the jury's presence. (Tr. 2422, 2560-61).

Finally, even assuming *arguendo*, that Judge Palmieri's inquiry of and comments in his charge concerning Stoessinger somehow conveyed an impression of attempting to bolster his credibility—a contention we vigorously dispute—the Court corrected any possible erroneous impression by cautioning, on numerous occasions, that the jury was “the sole judge of the facts,” (Tr. 2490), and its members “the sole judges of the credibility” and “the sole judges of the weight that should be given to any particular item of proof, whether it is testimony or an exhibit.” (Tr. 2554). The Court also emphasized that if it referred to any testimony, its purpose was to clarify rather than “highlight” and that the jury should “not attribute to any questions that [the Court] may have asked during the trial any special importance.” (Tr. 2492, 2493). With respect to Stoessinger, the Court emphasized that while Stoessinger “was one of the important witnesses in the case”, it was the jury’s “decision [to determine] the nature and extent of the probative value of his testimony.” (Tr. 2562).^{*} Finally, after counsel made exceptions to the charge, the court took special care to caution the jury: “if I have said anything or done anything to give you the impression I am trying to jump into the jury box as a phantom juror, remove that impression from your minds. I have no such intention.” (Tr. 2615).

Thus, the Court, both generally as to all witnesses.^{**} and specifically as to Stoessinger, emphasized to the jury,

^{*} Defense counsel himself argued that “critical to that whole concept [Lamont’s intent in the Barry fraud] is John Stoessinger.” (Tr. 2422). In addition to the cautionary instructions referred to in the text, the Court instructed that the jurors were the sole judge of the facts on numerous other occasions. (Tr. 18, 22, 2490, 2492, 2493, 2494, 2552, 2554, 2615, 2617).

^{**} Lamont’s contention that in marshalling the evidence “the government evidence was over-emphasized, and the defense witnesses were disposed in eight lines” (Br. 37) is both misleading and inaccurate. As this Court predicted, in the context of approving another charge of Judge Palmieri, “As any trial judge knows, even the most meticulous effort to balance a summary of

[Footnote continued on following page]

that its members were the exclusive fact finders in the case.*

the evidence in the charge inevitably will be met with a claim of distortion." *United States v. Wiener*, 534 F.2d 15, 19 (2d Cir.), *cert. denied*, 429 U.S. 820 (1976). In this case, Judge Palmieri made brief reference to all the witnesses. (Tr. 2555-63, 2566-70). The government called twenty-three witnesses and the defense two and it can hardly be claimed that this matter-of-fact recitation of witnesses by the Court was error. See *United States v. Tourine*, *supra*, 428 F.2d at 869-70. In any event, the Court was scrupulous to set forth defendant's contentions throughout the charge. (E.g. Tr. 2517-18, 2525-26). He further charged that even "one witness, one piece of paper can stand against a whole room full of witnesses, against a whole room full of exhibits if you, the jury, find that one witness and that one exhibit told the truth." (Tr. 2572). In light of this favorable charge, Lamont's claim of unfairness by the Court comes with particular ill-grace.

*Lamont takes issue with the admission into evidence of the Information and the plea agreement which Stoessinger signed. (Br. 20). However, it is settled that the admission into evidence of such matter is entirely proper. See, e.g., *United States v. Araujo*, 539 F.2d 287, 290 (2d Cir. 1974); *United States v. Aloï*, 511 F.2d 585, 597-98 (2d Cir.), *cert. denied*, 423 U.S. 1015 (1975); *United States v. Koss*, 506 F.2d 1103, 1112-13 (2d Cir. 1974), *cert. denied*, 421 U.S. 911 (1975). Furthermore, Lamont misleadingly suggests that the Court "ignored defense counsel's request for a limiting instruction at that point." (Br. 20). After the Court had ruled on the admissibility of the documents, defense counsel asserted in the jury's presence that the "documents are self-serving on behalf of the government and should at least be limited in their acceptance by the jury." (Tr. 135). The Court's response specifically cautioned the jury that "they are not self-serving. They clarify an issue before this jury regarding both the motivation and credibility of this witness." (*Id.*). Thus, the judge properly instructed the jury that Stoessinger's plea and agreement to cooperate were factors for them to consider in assessing credibility. Indeed, trial counsel intensively cross-examined Stoessinger concerning his plea, including questions which pointed out that Stoessinger's sentence was postponed until after the trial and that Stoessinger hoped to "miss prison" by his plea to a charge of misprision of a felony. (Tr. 424-25, 439-44, 483). Finally, defense counsel failed to include a request pertaining to Stoessinger's plea agreement and Information in its Requests to Charge, (Court Ex. 11) thus precluding review in this Court, see Fed. R. Cr. P., Rule 30.

POINT III

The Court's Rulings on Defendant's Cross-Examination of Government Witnesses Were Proper.

Lamont claims that the trial court improperly curtailed cross-examination of John Barry and Jerry Timothy in violation of her Sixth Amendment right to cross-examination. This argument is frivolous.

The court that hears the evidence is best suited to rule on its admissibility. *Hamling v. United States*, 418 U.S. 87, 124-25, 127 (1974); *United States v. Kahn*, 472 F.2d 272, 281 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). Rulings on admissibility should not be overturned absent a showing of a clear abuse of discretion. *Hamling v. United States*, *supra*; *United States v. Catalano*, 491 F.2d 268, 273 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974). Similarly, the admission of evidence on cross-examination and the extent of its scope are matters for the trial court's discretion. *Alford v. United States*, 282 U.S. 687, 694 (1931); *United States v. Finkelstein*, 526 F.2d 517, 529 (2d Cir. 1975), *cert. denied as Scardino v. United States*, 425 U.S. 960 (1976); *United States v. Green*, 523 F.2d 229, 237 (2d Cir.), *cert. denied*, 423 U.S. 1074 (1975); *United States v. Pacelli*, 521 F.2d 135, 137 (2d Cir. 1975), *cert. denied*, 424 U.S. 911 (1976). A trial judge's determination of the proper scope of cross-examination is to be treated with "great deference", clear abuse of discretion being the appropriate test for reversible error. *United States v. Jenkins*, 510 F.2d 495, 500 (2d Cir. 1975). This is particularly true where it appears from the record that notwithstanding the exclusion of individual items of evidence, the cross-examination has nonetheless been "full and searching," *United States v. Kahn*, *supra*, 472 F.2d at 281; or where further questioning will sidetrack the trial by involving the court

in collateral issues which may cause undue delay or confusion. *Hamling v. United States*, *supra*, 418 U.S. at 127; Rule 403, Federal Rules of Evidence. See also Rules 103(a) and 611, F.R. Evid.

A. John Barry

Lamont sought to elicit from John Barry, a Canadian citizen, that he was arrested as a material witness because he had boarded a flight to return home to Canada, without advising the Assistant United States Attorney, who expected Barry to remain in New York to be prepared as witness for trial.* (Tr. 9/10/76 at 2). The trial court, on the Government's motion, precluded counsel from cross-examining Barry on this point. (Tr. 599-604; 649-52). Judge Palmieri properly and specifically found that to raise the misunderstanding "as a means of attributing either coercion to the Government or lack of voluntariness on the part of the witness would in my opinion be a gross injustice and tantamount almost to a fraud on this jury." (Tr. 651-52). See Fed. R. Evid., Rule 405, 611(a).

The court gave counsel great leeway on cross-examination to establish that Barry's financial situation was shaky and that Barry sought funding from speculative sources. (Tr. 759). Counsel established that Barry had overdrawn his account by \$260,000 at the time he gave Lamont the \$60,000 (Tr. 786), and further inquired whether Barry had drawn the \$60,000 without proper authorization. (Tr. 789-90; 800-01). Indeed, counsel

* Barry was released on bail the same day as his arrest. Three days later at a pre-trial conference, Judge Griesa found that the proceedings had been commenced on account of a misunderstanding and permitted Barry to return to Canada after first working out a scheduled number of appearances at the U.S. Attorney's office. (Tr. 9/13/76 at 39, 43).

established on cross-examination many of the points now claimed to be subjects that were precluded by the court's ruling on Barry's arrest as a material witness. (Br. 24-25), including the clarity of Barry's recollection and whether it was refreshed by documents shown by the Government. (Tr. 776). Defense counsel grilled Barry about the fact that he had been to the United States Attorney's Office ten times over a six month period and that his recollection improved as a result of those meetings. (Tr. 775-76). Since counsel elicited Barry's improvement in recollection without regard to the arrest, it can hardly be claimed that Lamont's substantial rights were affected. Rule 103, F.R. Evid. More fundamentally, two District Court Judges found that Barry was a voluntary witness and that the arrest was the outgrowth of a "misunderstanding" between him and the prosecutor. In that circumstance, it would strain reason to find that the court was without discretion to bar Lamont from exploiting a misimpression that the arrest itself contributed in any way to the truthfulness of Barry's testimony. Rules 403, 611(a), F.R. Evid.; *United States v. Jenkins, supra*.

B. Jerry Timothy

Lamont argues that the trial court improperly restricted cross-examination of Timothy by prohibiting counsel from inquiring of Timothy about GX 3521-B under the pretense of refreshing Timothy's recollection. (Br. 26-29). GX 3521-B was a document supplied to the Government by Snellen Johnson (and turned over to defense as part of Johnson's Jenck's Act material) that included a cover letter from Johnson and a list of Timothy's shareholdings prepared by an IRS agent, apparently on the basis of information supplied by Johnson. The list traced the ownership of the shares covered by certificates 1752 and 1753—certificates that Lamont obtained from Timothy and pledged at the West Virginia Bank.

The trial court properly prevented Lamont from using GX 3521-B under the pretense of refreshing Timothy's recollection when Timothy did not express the need to have his recollection refreshed; in particular, the court found that counsel had purposely refrained from asking Johnson about the accuracy of the dates of the stock transfers listed in GX 3521-B as a matter of trial tactics. (Tr. 1718).

Examination of the record establishes, as the trial court found, that counsel actually was not attempting to refresh Timothy's recollection as to whether or not he had presented any information to the IRS. To the contrary, the witness clearly and firmly had stated that the IRS was conducting an audit of him, that he had turned over his records to the IRS (Tr. 1710), but that he had not yet made any formal presentation to the IRS. (Tr. 1712). Thus, there was no indication that the witness needed his recollection refreshed. In actuality, counsel was improperly using the "refreshment of recollection" theory as a guise to impeach Timothy's credibility * through out-of-court statements by a non-witness, in clear violation of the hearsay rule.

Had the exhibit represented a prior inconsistent statement *by the witness*, cross-examination based on GX 3521-B could have been proper. Indeed, that was the situation in *United States v. Wolfson*, 437 F.2d 862 (2d Cir. 1970), upon which Lamont primarily relies. Here, by contrast, the trial court found, and the record establishes, that GX 3521-B was not a competent document to impeach Timothy's credibility because it was not a prior statement of the witness (Tr. 1715-16), nor had the

* Indeed, counsel virtually admits that this was the purpose (Br. 27) by arguing that GX 3521-B was relevant to show Timothy lied in an affidavit that he prepared in October, 1972 to obtain replacement certificates for certificates 1752 and 1753.

document been authenticated. Since the preparer of GX 3521-B was not available for cross-examination, the document could not be received.*

Lamont now argues for the first time that the purpose in using GX 3521-B was to establish that Timothy had lied in an affidavit concerning the disposition of the Navsat shares represented by certificates 1752 and 1753.** Since this Court has ruled that "a specific objection *overruled* will be effective to the extent of the grounds specified, and no further," *United States v. Bennett*, 409 F.2d 888, 892 (2d Cir.), (Friendly, J.) (emphasis in original), *cert. denied*, 396 U.S. 852 (1969), quoting 1 *Wigmore*, Evidence § 18 at 339 (3d ed 1940), Lamont has not preserved the issue for appeal. Moreover, even assuming her presently stated purpose, counsel did interrogate Timothy on cross-examination on this precise point by inquiring whether Timothy had resold the very shares covered by certificates 1752 and 1753 without even waiting for their cancellation. (Tr. 1711-12).*** Unfortunately

* In any event, the document is hardly as important as Lamont now baldly asserts. First, the document actually corroborates Timothy's ownership of at least 87,500 shares of Navsat in addition to those represented by certificates 1752 and 1753. Second, the exhibit corroborates that Timothy sold the replacement shares for certificates 1752 and 1753 only *after* Lamont had *told* Johnson in August that she had destroyed certificates 1752 and 1753 although some were sold before he filed the affidavit. Thus, even assuming its accuracy, upon analysis GX 3521-B was of no help to Lamont and actually corroborated the testimony of Timothy and Johnson.

** At the side-bar, counsel did not articulate this reason for the question. Instead counsel argued that GX 3521-B tended to show that either Johnson lied in his court letter that GX 3521-B was accurate (Tr. 1714) or that Timothy was lying about not presenting information to the IRS. (Tr. 1718).

*** Apparently Lamont's contention is that Timothy cancelled certificates 1752 and 1753 in order to sell his shares twice. This theory makes no sense because the record is uncontradicted that Lamont never paid Timothy for the stock and that Timothy

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for Lamont; Timothy explained that he owned more shares of Navsat than just certificates 1752 and 1753 and that the other sales of Navsat stock in the summer of 1972 involved those different shares. (Tr. 1712).*

In any event, the court's ruling did not prejudice Lamont in light of counsel's extensive cross-examination of Timothy, which elicited a wide-range of impeachment material and covered five times as many pages as the direct.** *United States v. Pacelli, supra*, 521 F.2d at 138; *United States v. Jenkins, supra*, 510 F.2d at 500.

POINT IV

The Instructions to the Jury Were Entirely Proper.

Lamont contends that Judge Palmieri made several errors in his charge. This claim is totally devoid of merit.

cancelled the certificates only after having been told that Lamont claimed to have destroyed the certificates. (Tr. 1607, 1430-32; GX 418(d)(2), 418(e)(2)).

* Lamont intentionally chose not to question Johnson about the accuracy of GX 3521-B. In precluding the question about GX 3521-B the trial court explicitly found: "for you to attempt to use an IRS report to a third party whom you could have cross-examined but chose not to in an effort to contradict [Timothy] is entirely improper and I won't permit it and again, I have the impression that you are using it as a delaying tactic." (Tr. 1718).

** On cross-examination, Timothy testified to the preparation of potentially misleading brochures about the satellite navigation system (Tr. 1641); to entering a contract with Philco-Ford on the false premise that Navsat had a million dollars to back up a certificate of deposit when it did not (Tr. 1643); about his own bankruptcy proceedings (Tr. 1661); about backdating stock certificates to avoid taxes (Tr. 1674, 1694, 1696); about falsely stating to a Postal Inspector that he never had met Lamont and never gave her Navsat stock (Tr. 1680, 1693); and about an IRS audit. (Tr. 1710).

A. Judge Palmieri Correctly Charged The Jury On The Issue Of Intent

Without ever expressly stating that Judge Palmieri committed reversible error in his charge, Lamont takes issue with the Court's instructions on the issue of intent. Apparently, her contention is that the Court's use of the term "reckless" would have violated the rule enunciated in *United States v. Hanlon*, 548 F.2d 1096, 1100-102 (2d Cir. 1977), had the charge been given subsequent to the issuance of the *Hanlon* decision. Lamont also claims that the charge violated pre-*Hanlon* law, although Lamont never articulates the precise basis for this contention. These contentions are meritless. The Court's instructions made abundantly clear both that defendant could not be convicted on the basis of negligence and that good faith was a complete defense.

The Court charged that the Government must prove beyond a reasonable doubt each of the essential elements including:

"that a scheme or artifice to defraud or to obtain money by false and fraudulent pretenses, representations and promises as alleged in the indictment was devised by the defendant, two, that the defendant knowingly and wilfully participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with intent to defraud, and the third element is as to each count there occurred in execution or furtherance of that scheme the use of interstate or foreign wire facilities with respect to the wire fraud counts or the use of the mail [for] Count 8" (Tr. 2515).

The Court's definitions of "knowingly" "wilfully", and "with intent to defraud" were eminently correct. The term knowingly was defined as "to act *purposely* and *deliberately* rather than through mistake inadver-

tence or other innocent reason." (Tr. 2521) (Emphasis supplied). Wilfully was defined as "to act intentionally with a bad purpose", and intent to defraud meant "to act knowingly and with the specific intent to deceive for the purpose of either causing some financial loss to another or bringing about financial gain to one's self." (Tr. 2521-22). The Court continued by emphasizing that "it follows that *good faith on the part of a defendant is a complete defense*" and that

"a defendant has no burden to establish a defense of good faith, however. *The burden is on the Government to prove fraudulent intent and consequent lack of good faith beyond a reasonable doubt.*" (Tr. 2523) (Emphasis supplied).

Furthermore the Court went to great pains to emphasize that negligence "does not constitute knowledge and intent." (Tr. 2530-31, 2526). Finally, as the Court summarized: "the Government must establish beyond a reasonable doubt that she knew her conduct as a participant in the schemes were calculated to deceive . . . and nonetheless that she associated herself with the alleged fraudulent conduct." (Tr. 2526).

Apparently, Lamont finds fault with the limited portion of the charge that permitted the jury to infer actual knowledge if they found that Lamont closed her eyes to the truth or falsity of her representations. In this regard, the instant charge is more favorable to the defendant than the one which this Court recently found "was not error, plain or otherwise." *United States v. Hanlon, supra*, 548 F.2d at 1102. Here, the Court made abundantly clear that this standard was merely a factor in determining "actual knowledge."

"The Government can also meet its burden that a defendant had *actual knowledge* of falsity if it establishes beyond a reasonable doubt that she acted with a *deliberately reckless disregard* of whether the statements were true or false and

with a conscious purpose to avoid learning the truth. (Tr. 2527) (Emphasis supplied).

Later the Court coupled a "reckless disregard" standard with the consciously closing the eyes standard:

"If you find that Lamont acted with reckless disregard of whether those statements and documents were true or false *and with a conscious purpose to avoid learning the truth*, you can draw the inference, if you so choose, that she acted out of guilty knowledge and fraudulent intent." (Tr. 2531)*

The Court's instruction was totally in accord with the applicable precedent. In *Hanlon* this court found

* Earlier, the Court charged that "schemes or artifices to defraud" included tricks, artifices and devices "intended to deprive a person of his money or property whether by false representation or suppression of truth or reckless disregard of the truth" and that in considering whether or not a statement, representation, or claim was false, the jury should consider if it "was then known to be untrue" or

"if that person deliberately or recklessly blinded herself to the knowledge that it was false. A statement, representation, claim or document is fraudulent if it was falsely made or caused to be made with intent to deceive." (Tr. 2516).

It also should be noted, that the terms "reckless" or "recklessly", appeared at least three times in the Government's Request to Charge, and only on one occasion did Lamont submit an objection. (Ct. Ex. 10, Req. No. 7, at 1; Request No. 8 at 4, 8). Furthermore, after the charge was given, Lamont did not specifically object to the inclusion of these terms. Since this Court has specifically held that a failure to make a contemporaneous objection to a charge will bar appellate review even though a contrary instruction had earlier been requested, see *United States v. Bermudez*, 526 F.2d 89, 97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Nathan*, 536 F.2d 988, 992-3 (2d Cir.), *cert. denied*, 429 U.S. 930 (1976), Lamont cannot complain of the language on appeal.

"no error" in an instruction that it was possible to *infer* that an "individual had acted in *reckless* disregard of whether or not a given fact was false." 548 F.2d at 1100 (Emphasis supplied). Here, the Court's charge was more rigorous since it became applicable only if the jury *found* that the defendant acted with reckless disregard; moreover, the Court's charge coupled this reference to the conscious avoidance standard. Finally *Hanlon's* direction that in the "future" the term *reckless* should be avoided does not apply since the instant charge preceded the *Hanlon* decision by a month.

Equally misplaced is Lamont's reliance on the pre-*Hanlon* precedent. Judge Palmieri's instructions were consonant with the applicable law. See *United States v. Bernstein*, 533 F.2d 775, 796 (2d Cir.), *cert. denied*, 421 U.S. 962 (1976); *United States v. Jewel*, 532 F.2d 697, 700-01 (9th Cir.) (en banc), *cert denied*, 426 U.S. 951 (1976); *United States v. Natelli*, 527 F.2d 322-23 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *United States v. Sarantos*, 455 F.2d 877, 880 (2d Cir. 1972); *United States v. Clark*, 525 F.2d 314 (2d Cir. 1975).^{*} Indeed, both *Bernstein* and *Sarantos*, were affirmances of convictions where the Court charged in terms of "reckless disregard" in the disjunctive rather than coupled with the conscious avoidance standard.^{**}

^{*} Moreover, unlike the court in *United States v. Bright*, 517 F.2d 584 (2d Cir. 1975), Judge Palmieri explicitly charged that "however misleading or deceptive a plan maybe, it is not fraudulent if it was devised and executed in good-faith with an honest belief in the truth of the representation made." (Tr. 2523). See also, *United States v. Gentile*, 530 F.2d 461, 469-70 (2d Cir.), *cert. denied*, 426 U.S. 936 (1976).

^{**} Lamont misleadingly suggests that Judge Palmieri did not conform with the requirements of Rule 30, F.R. Cr. P. and that the Court's charge was extemporaneous. (Br. 30). In fact, the record reveals that: (1) Lamont's requests to charge were submitted tardily and a week after the Government submitted

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In any event, viewing the Court's charge in its entirety, *United States v. Bright, supra, United States v. Gentile, supra*, 530 F.2d at 469, it is clear that it secured for Lamont the benefits of both proper balancing language and that honesty and good faith were a complete defense. See *e.g., United States v. Natelli, supra*, 527 F.2d at 322-23. The jury by its verdict obviously decided that Lamont did have the requisite guilty knowledge and was not motivated by good faith.

B. The Court Correctly Charged That Communications Must Be In Furtherance Of The Schemes

Without citing any precedent, Lamont contends that: "the Court's charge permitted a conviction even if the jury found that the defendant had no criminal intent at the time of the use of the mails and telephone." (Br. 34). This contention is meritless.

With respect to the wire fraud Counts 1-4, which pertain to the Barry-Studio Center fraud, and Counts 6

its Requests (Tr. 1342-43, 2127, 2309); (2) the day before the summations and over two weeks into the trial, when the court wanted to review the charges not only had the defendant failed to submit its charges, but defense counsel sought and obtained an early adjournment for the day (Tr. 2309); (3) at this time, the Court specifically advised counsel that if the defendant did not testify "you are going to sum up tomorrow" (*Id.*). Furthermore, the Court gave counsel an opportunity to provide written comments to the submitted requests to charge, of which opportunity counsel made use. (Tr. 2488; Court Ex. 9, 10, 11). Later, the Court specifically advised counsel that "I have considered all of your comments" and, contrary to the implications of Lamont's brief, Judge Palmieri's learned charge was "very carefully phrased." (Tr. 2548, 2594). With this factual setting, Lamont's claims of error come with particular ill-grace. In any event, since Lamont did not object to the procedure employed by the Court, any claim she might have had is waived, as this Court has recently and specifically noted. *United States v. Conlin*, Dkt. No. 76-1346, slip op. 2375, 2383 (2d Cir. March 17, 1977).

and 7 which pertain to the Navsat-West Virginia fraud, the Court explicitly charged:

"the Government must also establish beyond a reasonable doubt that the particular wire communication under consideration occurred during the existence of the scheme and in its furtherance and if the scheme had ended prior to it, or in no way had depended upon the wire communication to effect its fraudulent purpose, then the jurisdictional element has not been supplied." (Tr. 2535) (Emphasis supplied).*

These portions of the charge, which are conveniently omitted from Lamont's brief, explicitly instructed that the jurisdictional element had not been satisfied unless the Government proved beyond a reasonable doubt that the use of the wires or of the mails: (1) *occurred during the existence of the scheme*; (2) was in furtherance of the scheme and (3) the scheme depended on the communication. The Court had already charged the jury that:

"a scheme to defraud is any plan, device or course of action to obtain money or property by means of false or fraudulent pretences, representations or promises which were calculated to deceive persons." (Tr. 2515-6).

Thus, the jury had been explicitly instructed that to satisfy this third element of the offense, the Government had to prove that each communication occurred during and was executed in furtherance of a "scheme" to defraud.**

* The Court similarly charged the jury with respect to Count 8, the mail fraud count. (Tr. 2537).

** Indeed not only had the Court already instructed the jury on the first element, the existence of the scheme or artifice to defraud devised by the defendant, (Tr. 2515-20), but also whether

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The challenged portion of the charge, (Tr. 2523) was included in the Court's charge on intent. It immediately preceded a discussion on how intent can be gleaned from circumstantial evidence, including the fact that subsequent events and subsequent representations—such as the manner in which the funds were expended may be considered circumstantial evidence of defendant's intent. (Tr. 2525). In so charging the Court did not instruct the jury, as Lamont now suggests, that it could convict Lamont if it found there had been wire transfers or mailings and only later did Lamont devise the scheme to defraud. To the contrary, the court was merely—and correctly—instructing the jury that it should look to Lamont's subsequent actions as indicia of Lamont's state of mind at the time the communications occurred.*

the defendant participated in the scheme or artifice to defraud knowingly, wilfully and with intent to defraud. (Tr. 2521-32). See e.g., *United States v. Finkelstein*, *supra*, 527 F.2d at 526-7. See *United States v. Houlihan*, 332 F.2d 8, 14-15 (2d Cir.), *cert. denied*, 379 U.S. 859 (1964); *United States v. Postma*, 242 F.2d 488, 496-7 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957); *Frank v. United States*, 220 F.2d 559, 564 (10th Cir. 1955); see also *Forshay v. United States*, 68 F.2d 205, 210 (8th Cir.), *cert. denied*, 291 U.S. 674 (1934); *Pandolfo v. United States*, 286 F. 8, 15 (7th Cir. 1922), *cert. denied*, 261 U.S. 621 (1923).

* Indeed, to the extent that the claimed vice is that the challenged passage permitted a conviction based on communications that were not as yet part of a scheme to defraud, this was remedied by the Court's charge:

"The defense has argued that the evidence is insufficient to refute beyond a reasonable doubt the claim that Lamont acted in good faith and *she honestly expected to obtain the loan for Studio Center or that she would pay back the loan to the West Virginia Bank and would have given the proceeds of the loan to Snellen Johnson and Navsat and that external conditions caused her to fail.*

The defense claims that at worst the defendant Lamont

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Finally, even assuming *arguendo* that the judge's charge on this point was in isolation confusing, its application to the instant facts dispels any notion that the jury resolved the matter on an impermissible basis. In late May 1972, when Lamont sought the West-Virginia loan, she submitted restricted collateral, the misleading Stoessinger letters, and a false financial affidavit which overstated her income by over \$700,000 (Tr. 1794, 1797-1801, 1806-07, 1810; GX 13B-1, 14A-1, 430). Indeed defense counsel in his summation did not—as he could not—contest the false nature of this financial statement, rather arguing its materiality. (Tr. 2459).

It bears emphasis that this affidavit, in addition to two of the Stoessinger letters, was submitted prior to the communications charged in Counts 6-8. Thus, whatever Lamont's defense was, it can hardly be suggested that she evidenced good faith at the time the loan was sought. Similarly, with respect to Counts 1-4 the jury heard testimony, and apparently accepted, that at the very time Lamont was making representation to Barry that the financing was secured and that only \$50,000 was needed, Lamont already owed the West-Virginia bank \$225,000, had already defalcated Johnson's and Timothy's Navsat stock, and had already learned from Aubert that the Studio Center project was not feasible (Tr. 1429-30, 1444, 1607, 1871, 1880, 2283). Further, the evidence revealed that on the very day Lamont secured the moneys from Barry she falsely told a neutral party, Thomas McGee, the Chelsea Bank manager, that she needed to wire funds to Europe without delay. (Tr.

was foolish or mistaken or perhaps negligent but that she never acted out of fraudulent intent.

If you accept that, if you believe that the facts of this case justify you in reaching that conclusion, you have the duty to acquit the defendant on all counts." (Tr. 2525-26).

1111, 1114). Against this factual setting it strains credulity that the challenged passage could have had anything other than an innocuous impact.*

POINT V

The District Court Properly Refused To Grant A Continuance Or To Limit Cross-Examination

Lamont claims that the district court erred in refusing defense counsel's eleventh-hour request for a continuance in order for counsel to locate a witness to authenticate hotel records and in refusing to rule in advance that the Government would be restricted on cross-examination of Lamont to the authenticity of an airline ticket and the hotel records if she took the stand for the sole purpose of offering those documents. This claim is without merit.

On December 7, 1976, during the third week of trial, Lamont's counsel requested that the court adjourn one hour early in order to determine whether to

* Furthermore, contrary to the assertions contained in Lamont's brief (Br. 35), Lamont's counsel at trial invited this portion of the charge by suggesting on *two* occasions during the summation that the jury should focus on specific instances in time to determine whether Lamont had the requisite intent. (Tr. 2421-22, 2463). Finally, Judge Palmieri's charge on immaterial variance as to dates and amounts was a correct application of this boilerplate charge. (Tr. 2542; Br. 36-37). See, *United States v. Panebianco*, 543 F.2d 447, 455-56 (2d Cir. 1976), *cert. denied*, — U.S. — (1977); *United States v. Houlihan*, *supra*, 332 F.2d at 14; *United States v. Postma*, 242 F.2d at 496-7; *United States v. D'Anna*, 450 F.2d 1201, 1204 (2d Cir. 1971); *United States v. Edelman*, 414 F.2d 539, 542 (2d Cir. 1969), *cert. denied*, 396 U.S. 1053 (1970).

call the defendant as a witness. (Tr. 2307-09).^{*} At the same moment, for the first time, and notwithstanding an outstanding order that defendant produce to the Government all documents it intended to offer in its case in chief pursuant to Rule 16(b), F. R. Crim. P., Lamont notified the Government that she sought to offer a passport and hotel bills as evidence. (Tr. 2307-08). Counsel must have known his intention to offer these documents ever since December 2, five days earlier when Johnson testified.^{**}

On December 8, 1976, the Government stipulated to receipt of the passport as a defense exhibit, but declined to stipulate as to the other documents because their accuracy and authenticity could not be ascertained, despite the Government's best efforts. (Tr. 2315-16). The Court remarked: "I think that the Government has gone far beyond the call of duty. Mr. Segal, in trying to help you, in light of the statements just made I don't see how you can offer these [exhibits] unless you decide to put your client on the stand." (Tr. 2317). Counsel then requested an advance ruling to limit cross-examination of Lamont, but the court refused to protect the defendant "against any question *relevant* to the issues." (Tr. 2318).

When, for the first time, counsel stated that he had an airplane ticket he wanted to offer, the Court ruled that counsel should have been prepared with a witness or, at least, have given the Government enough

^{*} At this time, counsel acknowledged that if Lamont did not testify, he would have to "dig up" hotel witnesses to authenticate business records. (Tr. 2308). In addition, counsel was specifically advised that summations would be held the next day if the defendant did not testify. (Tr. 2309).

^{**} Five days earlier counsel had advised the Government while Johnson was on the stand that he had a surprise that would contradict Johnson's testimony. (Tr. 2316-17).

time to authenticate the proffered exhibits. (Tr. 2318-19). Counsel then stated he would reconsider calling Lamont as a witness; adding: "If I could have an hour, I *might* be able to dig up two witnesses, one from the airline and one from the Barclay Hotel." (Tr. 2320-21). After a brief recess, the Government reported that the hotel officials possibly had located a document related to DX X-1. (Tr. 2322). The court, however, held that since the names of both Lamont and Stoessinger appeared on the exhibit, it was possible that only one of the two stayed at the hotel on the day in question. (Tr. 2324). The Court explicitly ruled that the document was "of an equivocal nature. It doesn't pin a lie to the Government witnesses." (Tr. 2325).

After the Government's initial summation, the Government reported that the local hotel records had arrived (Ct. X 8) and that they did not correspond to the records proffered by Lamont. (Tr. 2399). Counsel then for the first time actually offered the airplane ticket. (Tr. 2400). The Court repeated that since the Government had been "extraordinary" in its efforts and that since DX X-1 was not consistent with Ct. X 8, the Court would not require the Government to stipulate to DX X-1. (Tr. 2401-02).

Under these circumstances,* there was no error in refusing the continuance. With respect to the local hotel records, Lamont incurred no actual prejudice from denial of the continuance, in any event, because Court's Exhibit 8 did not corroborate the defendant's exhibits, and further because, the exhibit itself was equivocal.

* Prior to trial, counsel requested and was granted two adjournments of the trial date so that he could adequately prepare. (Tr. 10/7/76 at 3, 15).

With respect to the airline ticket, there was also no actual prejudice, since the Government had stipulated to receipt of the passport, and counsel effectively argued on summation that Lamont had not been in the United States on the date in question. (Tr. 2454-56).^{*} See *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2830-33 (2d Cir., April 13, 1977); *United States v. Frattini*, 501 F.2d 1234, 1237 (2d Cir. 1974).

Lamont's next claim, that the trial court erroneously refused to limit the cross-examination of Lamont to the authenticity of those documents, is contrary to law. Rule 611(b), F.R. Evid., explicitly permits cross-examination to include "matters affecting the credibility of the witness" and leaves to the Court's discretion to "permit inquiry into additional matters as if on direct examination." Indeed, *United States v. Dillon*, 436 F.2d 1093, 1094 (5th Cir. 1971) relied upon by defendant (Br. 40) holds that "the scope of the direct examination may be exceeded on cross-examination in an effort to test the credibility of the witness."^{**} Judge Palmieri correctly ruled that if she testified, the Government could inquire into all relevant issues, which would have included her credibility had she testified. See *United States v. Pfingst*, 477 F.2d 177, 193 (2d Cir. 1973).

POINT VI

The Court's Rulings On Charts Were Proper.

Lamont claims that the Court erred when it permitted counsel to employ a chart during its summation and its interrogation of its own witness, Michel Aubert,

^{*} Even if a hotel and airline witness had been found, the exhibits would not have been admissible as business records since the exhibits were Lamont's customer copies.

^{**} Since the authenticity of the bills and ticket directly related to when Lamont met Johnson and therefore whether they entered any agreement, cross-examination on those issues plainly would have been permissible even under the ancient and stricter cases cited by Lamont.

without permitting its introduction into evidence. (Br. 42). This contention is without merit.

The proffered chart (DX U-1), was based on the testimony of Michel Aubert, who testified, over the objection of government counsel, to various communications and conversations he had with supposed third-party financiers, who were neither present at the trial nor subject to cross-examination. (Tr. 2236-71). Not only was a great bulk of this testimony objectionable as hearsay, but large portions consisted of hypothetical responses as to what would have occurred had everything worked out. (Tr. 2253-56, 2262-69). The Court provided Lamont with great latitude by permitting this line of inquiry at all.

However, when the defendant sought to compound this questionable testimony with the introduction of a chart based heavily on hearsay and hypothetical communications, Judge Palmieri acted well within his authority in finding that to allow its introduction into evidence would be "misleading". (Tr. 2272, 2252-56, 2266, 2269). *United States v. Conlin*, *supra*, Slip Op. at 2381 (citations omitted).^{*} Judge Palmieri merely tried to balance the chart's potentially misleading effect on the jury, with

^{*} DX U-1 differed dramatically from the charts offered into evidence by the Government. The Government's charts were almost exclusively based on documentary evidence, and in those few instances in which portions were based on testimony, the Government provided witnesses who were subject to cross-examination. See, e.g., Tr. 1443, 1783, 1838-40, 2026-27, 2040-45. Furthermore, contrary to Lamont's assertion (Br. 44), the portion of Aubert's testimony that related to his conversations with third parties was controverted. (Tr. 2253-56, 2468). Finally, any suggestion that the Court unwarrantedly bolstered the Government's chart is dispelled by the Court's cautionary instruction. (Tr. 2615-16).

his desire to give the defendant great leeway. Cf. Rule 403, Fed. R. Evid.

Finally, it is hard to fathom the alleged prejudice claimed to have been suffered by defendant. Counsel used the chart extensively, both in his questioning of Aubert and his summation to the jury. (Tr. 2266-72, 2445-48). Indeed, after the Court ruled that the chart could not be used by counsel but not admitted into evidence, counsel stated:

"[I]f the Court will allow me to use it in making a presentation to the jury, that would be acceptable." (Tr. 2272-73).

POINT VII

The District Court Properly Complied With Rule 16(d)(1), Federal Rules Of Criminal Procedure And The Sentence Was Not Harsh.

Lamont complains that she was improperly prevented from knowing the nature and contents of the Government's pre-trial *in camera*, *ex parte* application pursuant to Rule 16(d)(1) with the possible consequence of her receiving a more severe sentence, being deprived of cross-examination material, and influencing the conduct of the trial judge. These claims are erroneous and are based upon a misapprehension of the nature and contents of the *in camera*, *ex parte* application. (Ct. X 1, sealed). On October 22, 1976, one month before trial, the Government alerted counsel by letter that "pursuant to F.R. Crim. P. 16(d)(1) the Government today submitted an application to the Court *in camera*, *ex parte* in the above-captioned matter."

The procedure followed is explicitly sanctioned by Rule 16(d)(1), F.R.Crim.P. See *Giordano v. United*

States, 394 U.S. 310, 314 (1969) (Justice Stewart, concurring).*

Lamont was convicted on seven counts of mail and wire fraud, each count carrying a maximum penalty of five years and \$1,000. Given the fact that she had netted \$285,000 and her exposure to a maximum term of imprisonment of 35 years, the sentence of three years hardly can be described as excessively harsh. Nor is the sentence reviewable absent the possibility that the sentence was based upon misinformation, a misunderstanding concerning the defendant or on constitutionally impermissible factors. *United States v. Mejias*, Dkt. No. 1384, slip op. 2269, 2292 (2d Cir. March 10, 1977).

The minutes of Lamont's sentencing plainly establishes that none of these exigencies is present. The trial judge stated: "I will not take into consideration any facts other than those which were before this jury, the court, and with which I am thoroughly familiar." (Tr. 2/4/77 at 8, 15-16). *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976), rehearing en banc denied with opinion, slip op. 2591 (2d Cir., March 30, 1977), cited by Lamont is entirely inapposite since, there the trial court was not familiar with the case and the defendant, having only presided over the guilty plea, whereas here there was a three-week trial.

* Moreover, inspection of the sealed application confirms that Lamont suffered no prejudice and that it did not bear on issues involved in sentencing.

Indeed, Judge Palmieri enunciated the precise basis for his sentence:

"I feel that the jury reached a verdict that was fully justified by the evidence, and that the jury dealt with this case in a very conscientious and considerate manner. The defendant stands convicted of seven counts, violations of the statutes I have mentioned, the defendant who perpetuated the well-orchestrated larcenies disguised as projects in international finances. She performed her deceitful acts with careful premeditation over a protracted period of time. Her crimes were not motivated by stupidity, by economic desperation or by emotional stress. The defendant is a highly intelligent person and she misused her knowledge of international finance and her financial expertise to the detriment of a number of parties including a West Virginia bank, all of whom she persuaded to deal with her in good faith. Throughout this activity she exploited the good name of the United Nation's Secretary in pursuit of her crimes and with disregard of the consequences of such conduct." (Tr. 2/7/77 at 15-16).

Accordingly, these claims are without merit.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

That on the 11th day of May, 1977
he served a copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at the United States Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan, City of New York.

Steven M. Schay

11th day of May 1977

Mary L. Arent
MARY L. ARENT
 Notary Public, State of New York
 No. 03-4500237
 Qualified in Bronx County
 Cert. filed in Bronx County
 Commission Expires 12/31/2012